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In The Supreme Court of the United States

JACK RUBIN, ALEX MOSKOVIC, DAVID MERMELSTEIN, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, HANNA HARELI and DAVID GRINSTEIN,

Petitioners,

v.

ASSICURAZIONI GENERALI S.P.A. HOLOCAUST INSURANCE LITIGATION, SAMUEL HERSLEY, AGNES HEYMAN, PAOLA OREFFICE KULP and EUGENIA SCHENCKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SAMUEL HERSLEY, AGNES HEYMAN, PAOLA OREFFICE KULP AND EUGENIA SCHENCKER

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INTRODUCTION

Petitioners are eight objectors who seek to disrupt an historic class action settlement (the "Settlement") of claims brought by Holocaust survivors and their heirs to recover on insurance policies sold by Respondent Assicurazioni Generali S.p.A ("Generali") and related companies. Having no valid claim for relief themselves, and thus no incentive to opt-out, Petitioners would rather deprive these class members, many of whom are aged survivors, from obtaining immediate compensation for these policies.

The challenged Settlement resulted from more than a decade of hard fought litigation and arm's length negotiation, and was reached only after the District Court dismissed plaintiffs' claims based on this Court's decision in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003) ("*Garamendi*"). The lower courts' application of Rule 23 and this Court's class action precedent was both straightforward and unremarkable. Petitioners do not identify any circuit split, decision on an important federal question, or substantial departure from the usual course of judicial proceedings justifying certiorari review in this case. Their petition for a writ of certiorari ("Petition") should be denied.

COUNTERSTATEMENT OF THE CASE[1]

As this Court recounted in *Garamendi*, reparations for Holocaust victims was an issue deferred for decades due to the Cold War. *Id.* at 403-05. Following German reunification in 1990, numerous class action lawsuits were filed in United States courts against companies who did business in Nazi Germany and in Nazi-occupied areas of Europe. *Id.* at 405. The litigation resulted in countrywide settlements in Switzerland, Germany and Austria and the payment of over $7.5 billion to Holocaust survivors and their heirs. The Settlement with Generali concludes the last of the major Holocaust-related class actions.

Plaintiffs commenced the first class action against Generali in March 1997. *See In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 496-97 n.1 (S.D.N.Y. 2004) (hereinafter "*Generali II*").[2] Plaintiffs alleged that Generali

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[1] References to the Petition and its Appendix are cited as "Pet._" and "Pet.App._," respectively. Materials in the Court of Appeals record are cited as "A_" (joint appendix), "SJA_" (supplemental joint appendix) and "ASA_" (appellees' supplemental appendix).

[2] The Settlement applies to three class actions: *Cornell v. Assicurazioni Generali, S.p.A.*, No. 97 Civ. 2262 (S.D.N.Y.), *Schenker v. Assicurazioni Generali, S.p.A.*, No. 98 Civ. 9186 (S.D.N.Y.), and *Smetana v. Assicurazioni Generali, S.p.A.*, No. 00 Civ. 9413 (S.D.N.Y.). Several other lawsuits were commenced by individuals against Generali throughout the United States, and were transferred to the Southern District of New York for coordinated pretrial proceedings as part of MDL No. 1374, or removed to that district from New York state court. All told,

(Continued on following page)

cooperated with the Nazi regime, often by paying to it the value of life insurance policies purchased by Jews and other persecuted minorities. *Id.* at 496-97. Plaintiffs asserted claims on behalf of a class of Holocaust victims (or their heirs) under state statutes and common law as well as under international law, seeking to recover on Generali policies that either were paid to the Nazi regime or left unpaid after World War II. *Id.*

In August 1998, the parties initially agreed to a $100 million class action settlement conditioned on ratification by Generali's board of directors.[3] That ratification never occurred and as a result the 1998 settlement was aborted.

While the litigation proceeded,[4] Generali negotiated a separate agreement in 2000 with the

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twenty civil actions comprised the MDL proceedings when the District Court dismissed the litigation. *See Generali II*, 340 F. Supp. 2d at 496 n.1 (discussing the makeup of the MDL proceedings). A number of individual plaintiffs excluded themselves from the Settlement to continue their appeals of *Generali II*, which are pending before the Court of Appeals as *Cornell v. Assicurazioni Generali S.p.A.*, No. 05-5602 (2d Cir.).

[3] *See* David Cay Johnston, *Italian Insurer Agrees to Pay $100 Million in Holocaust Suit*, N.Y. TIMES, Aug. 20, 1998, at A8, *available at* 1998 WLNR 3001597.

[4] Generali asserted an unsuccessful motion to dismiss on *forum non-conveniens* and contractual forum selection grounds. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 349, 355-58 (S.D.N.Y. 2002) (hereinafter "*Generali I*"). Discovery proceeded, and class counsel reviewed and cataloged over 50 file boxes of documents produced by Generali.

International Commission on Holocaust-Era Insurance Claims ("ICHEIC"), a voluntary organization created in 1998 to set standards and process Holocaust insurance claims. *See generally Garamendi*, 539 U.S. at 406-07 (discussing the formation of ICHEIC).[5] That agreement, known as the Rome Agreement, provided that Generali would provide ICHEIC with $100 million to pay Holocaust-Era insurance claims.

In 2003, this Court decided *Garamendi*, holding that a California statute requiring insurers to disclose information about Holocaust-Era insurance policies was preempted because it interfered with the foreign policy of the United States, as embodied in certain Executive Agreements encouraging the voluntary settlement of Holocaust-Era claims. *Garamendi*, 539 U.S. at 425. Generali then moved to dismiss the Holocaust-Era litigation against it based on *Garamendi* and in October 2004 the District Court granted the motion, holding that plaintiffs' claims likewise were preempted. *Generali II*, 340 F. Supp. 2d at

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[5] ICHEIC was formed voluntarily by a number of major European insurers, the insurance commissioners of a number of states (including New York, California, Pennsylvania and others), the National Association of Insurance Commissioners, representative Jewish and Holocaust survivor and restitution organizations, the State of Israel, major European insurance commissioners and observers from the United States Government. It was chaired by former Secretary of State Eagleburger. *Garamendi*, 539 U.S. at 406-07.

507-08. Several plaintiffs, including the Respondent Class Representatives herein, appealed.[6]

During the Summer of 2006, while the appeals were pending, it became apparent that the $100 million that Generali provided to ICHEIC would be insufficient to pay all Generali-related claims, and that a substantial number of validated ICHEIC claims would go unpaid without additional funds. Class Counsel pressed for a new claims process that would attract additional claimants who had not submitted claims through ICHEIC. Class Counsel and Generali negotiated extensively over the next two months, finally executing the Settlement Agreement on August 25, 2006. A52.

Under the terms of the Settlement, Generali committed to (1) pay all validated but unpaid ICHEIC claims and (2) process new claims pursuant to a new program with new deadlines, paying all validated claims.[7] A67-69. The Settlement substantially adopted the eligibility and valuation criteria that ICHEIC developed and used, and which were

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[6] The appeals are pending as *Cornell v. Assicurazioni Generali S.p.A.*, No. 05-5602 (2d Cir.) (docket retrieved from PACER on Jan. 12, 2009). Pursuant to the Settlement Agreement, the Respondent Class Representatives agreed to stay their appeals. The remaining appeals were argued on June 10, 2008.

[7] Since the Settlement was approved, Generali has voluntarily paid out an additional $36 million without awaiting the conclusion of Petitioners' appeal.

supported by the United States Government. A67. *See Garamendi*, 539 U.S. at 407 (discussing the Government's support of ICHEIC). Importantly, the Settlement allowed all claimants whose claims had been denied by ICHEIC to submit a new claim. Administration of the Settlement would be supervised by the District Court. A68. In return, Generali would be released from Holocaust-Era insurance claims by members of the Settlement Class. A65-67.

In October 2006, the District Court granted preliminary approval of the Settlement and authorized dissemination of class notice. A85. The notice was comprehensive and relied upon multiple modes of notice that were successfully utilized in other Holocaust settlements.[8] A88-89, 90-93. These modes included newspaper publication, press releases, outreach and notice to over 8,000 NGOs, and a toll-free phone center. A94-99. An official Settlement website[9] posted the notice, claim form and other relevant information regarding the Settlement. A96-97. Twelve months later, some 50,000 individual class notices were also mailed to potential claimants

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[8] Class Counsel had extensive experience in litigating and managing Holocaust class action litigation and settlement class notice. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 138 (2d Cir. 2005) (describing the notice program), *cert. denied*, 547 U.S. 1206 (2006). Petitioners' counsel represented objectors to that settlement as well. *In re Holocaust Victim Assets Litig.*, 424 F.3d 150, 153 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006).

[9] http://www.nazierainsurancesettlement.com (last accessed Jan. 6, 2009).

worldwide. SJA18. The worldwide notice program covered 237 countries with notices in 16 different languages. A89.

The response of the Class was overwhelmingly positive. Approximately 50,000 claims were received in the new claims program by the extended deadline of August 20, 2008 against only approximately 400 opt-outs.

Prior to seeking final approval of the Settlement in the District Court, Class Counsel conducted several days of due diligence with Generali personnel and attorneys in Trieste, Italy, in order to confirm the basis for the Settlement, inspect the archival data available to process claims, and evaluate the adequacy of the claim processing group. A191-192. Satisfied that the factual basis for the Settlement was accurate and that Class members' claims have been and will be processed with utmost care and integrity, Class Counsel moved for final approval and certification of the Settlement Class.

The District Court held fairness hearings on January 31 and February 27, 2007. A353, 507. The Petitioners, through their counsel, appeared and objected to the Settlement at each hearing. After the first hearing, the parties agreed to amend the Settlement Agreement to satisfy Petitioners' primary objection that the claim deadline should be extended in anticipation that an archive of World War II concentration camp records, located in Bad Arolsen, Germany, would be opened to the public. A442. At the

second hearing, the District Court denied Petitioners' remaining objections, certified the Settlement Class, and approved the Settlement as fair, reasonable and adequate. A568; Pet.App.17a-23a.

Petitioners appealed the Settlement on several grounds, including the adequacy of class notice, the scope of the released claims, and the typicality and adequacy of representation. Following oral argument, the Court of Appeals remanded to the District Court so that individual mailed notice could be sent. Pet.App.14a-16a.

On remand, Petitioners again objected to the Settlement. The district court conducted a third fairness hearing on January 7, 2008 and heard argument on Petitioners' objections. SJA35. Concluding that the Settlement was "fair, reasonable and adequate," the District Court again approved the Settlement. Pet.App.6a-12a. Following another round of briefing, the Court of Appeals considered the remainder of Petitioners' objections and, finding them meritless, affirmed the judgment. SJA66; Pet.App.1a-5a.

REASONS FOR DENYING THE PETITION

Petitioners do not identify any inter-circuit conflict or raise any important but unsettled federal question for resolution by the Court. Sup. Ct. R. 10. Rather, Petitioners' primary argument appears to be that the Court of Appeals simply misapplied this

Court's prior decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) ("*Amchem*") and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) ("*Ortiz*"). Pet.14-25. This is a meritless argument, and one which does not justify granting the Petition.

Petitioners' remaining arguments consist of minor quibbles over the phrasing of the class notice, and a litany of irrelevant (and often factually unsupported) attacks on the ICHEIC program, Generali's participation in that program, and the adequacy of Class Counsel in obtaining fair and reasonable terms for the Class. None of these secondary arguments, which relate to fact-bound matters reserved to the District Court's discretion, support granting the writ in this case.

I. The Settlement and Settlement Class Raise No Due Process or Rule 23 Problems Under This Court's *Amchem* and *Ortiz* Decisions.

The Settlement Class certified below is a cohesive one that has none of the structural defects that the Court identified in *Amchem* and *Ortiz*. Petitioners fail to identify any intra-class conflict among discrete groups of class members with markedly different types of claims, or for that matter any other conflict that could undermine the typicality of the representative plaintiffs' claims or the adequacy of their representation. Moreover, the Settlement provides for opt-out rights and no funding limits, and therefore no

tensions exist from the need to allocate a limited fund among members of a mandatory class.

The Settlement Class here is a cohesive one in which all Class members assert the same claim – non-payment of insurance policies in force between 1920 and 1945 sold by Generali and affiliated companies. SJA32-33. The three class action complaints asserted claims as to this same group of policies, and the release is confined to those policies and the allegations of the complaints. A65. In short, there is complete congruity between the claims asserted, the release given and the entitlement to compensation. Further, all Class member claims are subject to the same eligibility and valuation criteria.

The Settlement herein exhibits none of the characteristics that the Court disapproved in *Amchem* and *Ortiz*. In those cases, the settlement classes included not only "present injury" claimants who had ripe tort claims for cancer and other asbestos-related disease, but also "exposure only" claimants who might develop such diseases in the future, and whose claims were premised on theories of liability that had mixed acceptance from state to state, such as medical monitoring, "pleural thickening," increased risk, and fear of future injury. *Amchem*, 512 U.S. at 604.

The Court in *Amchem* held that common issues did not predominate because of the "greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions" to

their respective claims. *Id.* at 624. The Court also criticized the lack of subclasses or other structural safeguards in the settlement to protect the diverse interests of the subgroups of class members, and held that conflicts between the present-injury class representatives and the "exposure only" class members they sought to represent rendered the representation inadequate under Rule 23(a)(4). *Id.* at 626-27.

In *Ortiz*, the Court considered a "limited fund" mandatory class settlement pursuant to Rule 23(b)(1)(B). As relevant here, the Court criticized the settlement for treating present and future claimants the same for purposes of allocating the limited fund, while carving out so-called "inventory plaintiffs" represented by class counsel in pending individual suits, despite the conflicting incentives and diverse interests that these groups had. The Court held that the class as defined, like the class in *Amchem*, lacked subclasses and other structural protections to prevent inequities in allocating the limited fund among the competing groups of claimants. *Ortiz*, 527 U.S. at 856-58.

In short, the Settlement Class in this case exhibits none of the internecine conflicts or structural flaws that doomed the "sprawling" class settlements in *Amchem* and *Ortiz*.

A. The Settlement Does Not Release Claims for "No Compensation" and Raises No Issue Under *Amchem* Justifying Certiorari.

The Settlement provides every Class member with the same opportunity to submit a claim for payment of an insurance policy. Petitioners seem to concede this. Pet.19. The Settlement is therefore nothing like the settlement vacated in *Amchem*, which singled out the "exposure only" plaintiffs for no compensation. Pet.14-21.

At bottom, Petitioners' complaint is *not* that certain categories of Class members are releasing claims for no compensation. These "categories" are illusory given the cohesiveness of the Class, the identity of the claims asserted, and their congruity with the claims released.[10] Every Class member will have the same meaningful opportunity to submit a claim for payment based on the same relaxed eligibility standards, without the myriad difficulties of having to prove the existence of a fully paid up policy issued 40 years ago and, importantly, without the risk that their claims will be foreclosed altogether through

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[10] Petitioners identify three "categories" of Class members who, Petitioners claim, are being forced to release claims without any compensation: Class members who previously submitted claims to ICHEIC but were denied, Class members who are unaware of their potential class membership, and Class members who purchased policies from Generali subsidiaries and affiliates.

the application of *Garamendi*. That is the primary benefit accruing to each Class member.

Stripped of their hyperbole and mischaracterizations, Petitioners' arguments are nothing more than the recognition that some Class members will be unable to establish eligibility for compensation in the claims process. But Rule 23(b)(3) class action settlements routinely employ eligibility criteria for claims administration, with the consequence that some class members will be unable to meet the required showing.

To be sure, the circumstances of World War II and the Holocaust, the intervening Cold War, and the passage of time are factors that complicate the eligibility determinations being made under the Settlement. The procedures and presumptions developed during the ICHEIC distribution – now substantially employed in this Settlement – address these concerns through relaxed eligibility standards under which Class members can recover even if they have no information about Generali policies owned by them or their forebears. These procedures are the same ones that the United States Government so strongly supported, as recounted in *Garamendi*. 539 U.S. at 407, 422-23.

The District Court considered all of these factors in concluding that the Settlement was fair, reasonable, and adequate. The Court of Appeals found no abuse of discretion, and the decision below affords no basis for granting the Petition.

B. The Settlement's Implementation of ICHEIC Eligibility and Valuation Standards Does Not Implicate *Ortiz* Concerns or Justify Certiorari.

This is not a "limited fund" case. Petitioners do not argue otherwise, nor could they – the District Court certified a Rule 23(b)(3) class for a "claims made" settlement in which Generali's maximum exposure is limited only by the number of valid claims submitted. With minor exceptions,[11] every validated claim will be paid at present value according to the Settlement's valuation formulas. Nevertheless, Petitioners inexplicably criticize the Settlement at length as if it were a limited fund case, arguing that the claims process must satisfy this Court's criteria for Rule 23(b)(1)(B) class settlements. Pet.21-25 (citing *Ortiz*, 527 U.S. at 839-40).

Petitioners' argument fails in its premise because any comparison to the settlement in *Ortiz* is untenable on its face.[12] This is not a case where the settlement pits different groups of claimants with competing interests against each other in a

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[11] For example, if a loan had been made to the insured on a policy, there will be a deduction.

[12] While Generali's maximum exposure to ICHEIC claims initially was capped at $100 million, it was not a "limited fund" in the Rule 23(b)(1)(B) sense because the $100 million was not allocated among the universe of all validated claims. Rather, validated claims were paid at full value (under ICHEIC formulas) until the $100 million was exhausted.

mandatory class with respect to the allocation of a limited fund. *Ortiz*, 527 U.S. at 857-59. And given that the Settlement provides opt-out rights, Petitioners' Seventh Amendment argument (Pet.25) is frivolous. *See Ortiz*, 527 U.S. 845-46 (stating that "*a mandatory class* followed by settlement of its action for money damages obviously implicates the Seventh Amendment") (emphasis added).

Disregarding Petitioners' misplaced reliance on *Ortiz*, Petitioners' real complaint seems to be that the Settlement makes compromises and judgments with respect to the values paid to successful claimants depending upon, *inter alia*, the countries and currencies (some of which are now defunct) in which the policies were issued. *See* Pet.23-24. But that is the nature of Settlement, and the lower courts took these compromises into account in finding the Settlement fair, reasonable and adequate.

II. Petitioners' Class Notice Arguments Are Meritless.

Petitioners identify no circuit split or legal holding by the Court of Appeals as to the content of the class notice that would justify granting the Petition. Nor do Petitioners identify any structural "[i]mpediments to the provision of adequate notice" of the type that concerned the Court in *Amchem*. 521 U.S. at 628.

To pass muster under the Due Process Clause, a class notice need only be "'reasonably calculated,

under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Rule 23 accords district courts with substantial discretion in formulating the content of a settlement notice. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir.) ("There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements"), *cert. denied*, 544 U.S. 1044 (2005). A settlement class notice need only "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.'" *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir.) (citations omitted), *cert. denied*, 423 U.S. 864 (1975). Notice is "'adequate if it may be understood by the average class member.'" *Wal-Mart Stores*, 396 F.3d at 114 (citations omitted).

The crux of Petitioners' argument is not that the notice omitted or misrepresented any material information about the Settlement. Rather, the Petitioners nit-pick the notice, offering speculative projections about what "impressions" Class members might have and subjective spin concerning what the notice "implies." Pet.26-27. Given the substantial discretion accorded the District Court over the content of the class notice, the Court of Appeals summarily and properly rejected these arguments. More importantly,

they do not justify the grant of the Petition in this case.

III. Petitioners' Remaining Contentions Are Meritless.

In the last section of the their brief, Petitioners offer a litany of criticism concerning the history of ICHEIC and Generali's participation in it, making ominous sounding accusations concerning "phantom rules", pressured arbitrators, failed auditors, and "commonly ignored" standards of proof. Pet.28-30. Moreover, Petitioners accuse the parties of misrepresenting that history to the District Court to obtain approval of the Settlement, and suggest that the District Court abandoned its obligation to protect the absent Class members. These are serious charges – ones that District Court and the Court of Appeals found to be meritless.

As relevant here, however, these ICHEIC-related arguments do not support granting the Petition because the Settlement is supervised by the District Court. ICHEIC ceased functioning in 2006. Whether or not ICHEIC performed as advertised has no bearing on whether *this* court-supervised Settlement will provide a fair, transparent and accountable claims process.

In sum, Petitioners merely ask the Court to speculate about hypothetical future disputes over claims administration that may never occur, presenting no concrete controversy for this Court to consider.

Cf. Nat'l Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803, 807-08 (2003) (stating that ripeness is a doctrine designed to prevent judicial interference with administrative proceedings until a decision has been finalized). Any complaints about the actual conduct of claims administration can be addressed to the District Court, which has authority under the Settlement in the first instance to resolve problems on the basis of a full factual record as they arise.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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